91 FLRR 1-1345

Ogden Air Logistics Center, Hill Air Force Base, UT and Air Force Logistics Command, Wright-Patterson Air Force Base, OH and AFGE, Local 1592

Federal Labor Relations Authority

7-CA-80212; 41 FLRA No. 66; 41 FLRA 690

July 18, 1991

Judge / Administrative Officer

Before: McKee, Chairman, Talkin and Armendariz, Members

Related Index Numbers

34.396 Bargaining Units, Employee Categories, Temporary, On-Call

44.377 Subjects of Bargaining, Conditions of Employment, Job Security, Furlough

72.611 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Indicia of Change

72.613 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Adequacy of Notice of Change

72.617 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Bargaining Over Impact and Implementation of Change

72.661 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, De Minimis

Case Summary

THE FURLOUGH OF ON-CALL EMPLOYEES SHOULD HAVE BEEN PRECEDED BY IMPACT BARGAINING. The union alleged that the employer violated 5 USC 7116(a)(1) and (5) by refusing to bargain over the impact and implementation of its decision to furlough several on-call employees for six months. The FLRA rejected the employer's argument that furloughing on-call employees did not constitute a change in their conditions of employment because the placement of on-call employees in a nonpay status derived from the nature of their on-call employment. The Authority analogized the furlough of on-call employees to the RIF or furlough of full-time employees, which was a condition of employment but which could not be effectuated without bargaining. There was a change in the working conditions of on-call employees, and it was more than de minimis. Compensation and benefits were adversely affected. The notice given to the union was inadequate. It was oral and did not specify either the number of employees to be furloughed or the expected date of the action. The FLRA issued a cease-and-desist order to remedy the violations.

Full Text

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached decision of the Administrative Law Judge. The Respondents did not file an opposition to the General Counsel's exceptions.

The complaint alleged that the Respondents violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by placing on-call employees in a nonpay status without affording the Charging Party (the Union) adequate notice and an opportunity to bargain over the impact and implementation of the change.

The Judge found that Respondent Ogden Air Logistics Center, Hill Air Force Base, Utah (Ogden or the Respondent) did not violate sections 7116(a)(1) and (5) of the Statute. The Judge dismissed those portions of the complaint alleging unfair labor practice violations by Respondent Air Force Logistics Command, Wright-Patterson Air Force Base (AFLC) because there was no evidence that AFLC had been involved in the events on which the complaint was based.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the

Statute, we have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed. We affirm the rulings. We adopt the Judge's findings and conclusions only to the extent consistent with this decision.

Noting that no exceptions were filed to the Judge's dismissal of those portions of the complaint as to AFLC, we adopt the Judge's findings and conclusions in that regard. Contrary to the Judge, however, we find that Ogden violated sections 7116(a)(1) and (5) of the Statute by placing on-call employees in a nonpay status without affording the Union adequate notice and an opportunity to bargain over the impact and implementation of the change. Accordingly, we will issue an appropriate remedial order.

II. Background

The American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive representative of a nationwide bargaining unit of AFLC employees. The AFLC's headquarters are located at Wright-Patterson Air Force Base, Ohio. The nationwide unit represented by AFGE also includes employees of Ogden who are located at Hill Air Force Base.

The American Federation of Government Employees, AFL-CIO, Council 214 (Council 214) is an affiliate of AFGE. Council 214 and AFLC are parties to a Master Labor Agreement. The American Federation of Government Employees, AFL-CIO, Local 1592 (Union) is an affiliate and agent of AFGE and Council 214 for the representation of Respondent's employees. The Union and Ogden are parties to a Local Supplemental Agreement.

In 1987, Ogden employed about 250 to 300 on-call employees. These employees are members of the bargaining unit and most of them work in the Maintenance Directorate at Hill Air Force Base. On December 9, 1987, representatives of the Union were called to a meeting with several management officials and were told that, because of a lack of funding and work, on-call employees in the Maintenance Directorate would probably be placed in a nonpay status in January 1988. The management officials present at the meeting provided no further information concerning the matter.

By letter dated December 18, 1987, the Union president requested bargaining and submitted nine proposals. Subsequently, by letter dated December 21, 1987, two additional proposals were submitted.

On December 28, 1987, Ogden: (1) notified the Union that on-call employees would be placed in a nonpay status on January 7 and 8, 1988; and (2) gave each on-call employee who was identified for placement in a nonpay status a letter setting forth the exact date of the employee's release to nonpay status and the reasons for the release. Affected on-call employees were briefed concerning their rights and benefits during the period that they would be in a nonpay status.

On January 8, 1988, Ogden, without notifying or meeting to negotiate with the Union, placed 131 on-call employees in a nonpay status. The affected employees remained in a nonpay status for about 6 months.

III. Administrative Law Judge's Decision

The Judge noted that: (1) on-call employees are employees who "work on an as needed basis during periods of heavy workload"; and (2) Federal Personnel Manual (FPM) chapter 340, a Government-wide regulation, governs on-call employment of the employees in this case. Judge's Decision at 5. The Judge found that, as to on-call employees at Hill Air Force Base, the FPM is augmented by: (1) a local regulation, 00-ALC-HAFB Regulation 40-340, which establishes procedures concerning the release and recall of on-call employees; and (2) Article 16(S) of the parties' local supplemental agreement, which provides that the service computation date of on-call employees will be used to determine the order of release and recall.

Relying on FPM chapter 340, subchapter 3-5, which requires an agency and an on-call employee to execute a special employment contract at the time of

appointment acknowledging periodic release and recall, the Judge determined that "[a] condition of employment of all on-call employees is employment on an as needed basis and placement in a nonpay status at the end of peak workload periods." Id. The Judge found that the Respondent had previously placed on-call employees in a nonpay status.

The Judge noted that the Respondent was obligated to bargain during the term of the collective bargaining agreement concerning negotiable Union-initiated proposals. The Judge also found that the complaint did not contain an allegation that the Respondent refused to bargain concerning the placement of the on-call employees in a nonpay status. The Judge stated, however, that the "Respondent's obligation to bargain on the Union's mid-term proposals did not affect Respondent's right to continue existing conditions of employment, including placing on-call employees in a nonpay status which . . . was specifically a condition of their employment." Id. at 6.

The Judge found that the decision in Department of the Air Force, Scott Air Force Base, Illinois, 19 FLRA 136 (1985) (Scott Air Force Base), relied on by the General Counsel, was not applicable in this case. In Scott Air Force Base, the Authority found that the agency's furlough of employees as a result of the annually scheduled closing of a nonappropriated fund snack bar constituted a change in the employees' conditions of employment and that the agency's failure to bargain over the impact of that change violated the Statute. The Judge stated that, in contrast to the employees in Scott Air Force Base, "it is a condition of employment of on-call employees that they are subject to periodic release to nonpay status." Id.

Based on his determination that on-call employees are employed subject to periodic release to a nonpay status as a condition of their employment, the Judge found that the Respondent did not change conditions of employment of on-call employees when it placed those employees in a nonpay status. The Judge concluded, therefore, that the Respondent's conduct did not violate sections 7116(a)(1) and (5) of the Statute.

IV. General Counsel's Exceptions

The General Counsel excepts to the Judge's finding that the complaint did not allege that "Respondents failed and refused to bargain . . . over the impact and implementation of the placement of on-call employees in a nonpay status . . . ." Exceptions at 4. The General Counsel contends that "[p]aragraphs 9 and 10 of the [c]omplaint, when read together, clearly allege that Respondents failed and refused to bargain . . . by placing on-call employees in a nonpay status prior to bargaining over the impact and implementation of such action." Id.

The General Counsel also excepts to the Judge's conclusion that the placement of on-call employees in a nonpay status did not involve a change in those employees' conditions of employment. The General Counsel asserts that on-call employees were employed, and in a pay status, prior to January 8, 1988, and were in a nonpay status on, and after, January 8, 1988. Relying on Scott Air Force Base and other Authority precedent, the General Counsel contends that removal from the payroll constituted a change in conditions of employment of on-call employees.

The General Counsel argues that the Judge erroneously relied on the employment contracts of the on-call employees in order to distinguish Scott Air Force Base. The General Counsel states that "just as on-call employees in this case may be removed from the payroll under existing on-call employment regulations and under their employment contracts (which essentially incorporate the on-call regulations), so too may all [F]ederal employees be removed from the payroll by furlough or [r]eduction-in-[f]orce (RIF) pursuant to existing regulations." Id. at 6. The General Counsel asserts that management has an obligation to bargain concerning furloughs and RIF's even though "[F]ederal employees are subject to furlough or RIF under existing regulation . . . ." Id.

The General Counsel argues that the Respondent's incorporation of "the terms of applicable on-call employment regulations into employment contracts should not defeat the Union's right to bargain over the impact and implementation of this change in this most fundamental condition of employment." Id. The General Counsel also asserts that "[s]hould the Authority uphold the Judge's decision in this regard, an agency could similarly avoid bargaining over the impact and implementation of furloughs (or RIF's) by the simple expedient of incorporating the essentials of furlough and (or RIF) regulations into employment contracts." Id.

The General Counsel points out that management briefed affected on-call employees concerning health and life insurance and employees' availability for recall from their nonpay status. The General Counsel argues that the fact that such briefing sessions were held "conclusively demonstrates that placement into nonpay status did change conditions of employment of on-call employees." Id. at 7.

The General Counsel also excepts to the Judge's failure to conclude that the Respondents violated sections 7116(a)(1) and (5) of the Statute by failing to provide the Union with: (1) specific advance notice of the intent to place on-call employees in a nonpay status on January 8, 1988; and (2) an opportunity to bargain over the impact and implementation of the decision to place on-call employees in a nonpay status. The General Counsel contends that the Respondents had an obligation to provide the Union with notice and an opportunity to bargain prior to changing established conditions of employment. The General Counsel also contends that, because the effect of placing employees in a nonpay status had more than a de minimis effect on unit employees, the Respondents had an obligation to provide the Union with specific advance notice and, in accordance with sections 7106(b)(2) and (3) of the Statute, an opportunity to bargain over procedures and appropriate arrangements for adversely affected employees.

The General Counsel notes that the Judge did not find that a change in conditions of employment had occurred and, therefore, did not address the issue of whether placing on-call employees in a nonpay status had more than a de minimis effect on affected employees. The General Counsel asserts that "the loss of pay for a six month period by 131 employees is ipso facto sufficient to establish that the furlough had more than de minimis adverse impact on unit employees." Id. at 8.

With respect to management's obligation to notify the Union concerning the placement of on-call employees in a nonpay status, the General Counsel contends that the notice given to the Union was inadequate because it did not specify either: (1) the number of on-call employees to be placed in a nonpay status; or (2) when the anticipated placement of on-call employees in a nonpay status would be implemented. The General Counsel asserts that "[a]t no time did Respondents furnish the Union with written notice of the furlough." Id. at 9.

The General Counsel asserts that, although the Union submitted proposals concerning the placement in a nonpay status of on-call employees, the Respondents did not meet to discuss the Union's proposals until after on-call employees had been placed in a nonpay status. The General Counsel argues that the "Respondents' failure to bargain with the Union concerning the impact and implementation of the furlough PRIOR to implementation on January 8 must therefore be found violative of [s]ection 7116(a)(1) and (5) of the Statute." Id. (emphasis in original).

V. Analysis and Conclusions

We conclude that Ogden violated sections 7116(a)(1) and (5) of the Statute when it unilaterally placed 131 on-call employees in a nonpay status without first giving the Union adequate notice and an opportunity to bargain concerning the impact and implementation of the change.

A. The Complaint Alleged a Failure to Bargain

As to the General Counsel's first exception, we note that paragraphs 9(b) and 10 of the complaint

state, in relevant part, as follows:

[9](b). The placement of on-call employees in a nonpay status . . . was implemented on or about January 8, 1988 prior to bargaining over the impact and implementation of such action with the Union.

10. By the acts and conduct described in paragraph 9, above, . . . Respondents have failed and refused . . . to bargain in good faith with the Union . . . and thereby did engage in . . . unfair labor practices in violation of 5 U.S.C. 7116(a)(5).

General Counsel's Exhibit 1(b) at 3. Paragraph 9(b) asserts that the placement of on-call employees in a nonpay status was implemented before impact and implementation bargaining with the Union had taken place. Paragraph 10 incorporates the acts and conduct described in paragraph 9(b) by reference and alleges a failure to bargain in violation of the Statute. Consequently, we find that paragraphs 9(b) and 10 of the complaint allege that the Respondent failed or refused to bargain concerning the impact and implementation of the Respondent's placement of on-call employees in a nonpay status.

B. Ogden Changed Conditions of Employment

There is no dispute in this case as to whether matters pertaining to the status of on-call employees concern the conditions of employment of those employees. Rather, the dispute concerns whether Ogden changed conditions of employment of on-call employees by placing them in a nonpay status.

The Judge found that on-call employees, as an established condition of their employment, may be placed in a nonpay status. Based on this finding, the Judge concluded that placement of on-call employees in a nonpay status did not constitute a change in conditions of employment because the placement of on-call employees in a nonpay status derives from the nature of their on-call employment.

We disagree with the Judge's conclusion that Ogden's action in this case did not constitute a change in conditions of employment. In this connection, we find the General Counsel's analogy to RIF's and furloughs to be instructive. Federal employees, as a condition of their employment, are subject to RIF's and furloughs. The fact that Federal employees may be RIF'd or furloughed, however, does not alter the fact that the actual RIF or furlough constitutes a change in conditions of employment: See, for example, U.S. Department of the Army Lexington-Blue Grass Army Depot, Lexington, Kentucky, 38 FLRA 647, 649 (1990) (Member Armendariz concurring as to other matters) (Lexington-Blue Grass Army Depot). In our view, when an employee's status changes from being paid for working to not working and not being paid, such a change constitutes a change in conditions of employment whether it results from the termination of on-call employment or a RIF.

In agreement with the General Counsel, therefore, we find that being removed from the payroll, whether pursuant to the implementation of a RIF, a furlough, or by placement in a nonpay status, constitutes a change in affected employees' conditions of employment. Here, on-call employees were in a paid status before January 8, 1988, and, starting January 8, 1988, were placed in a nonpay status for a period of about 6 months. Because the placement of on-call employees in a nonpay status removed the employees from the payroll, we conclude that the Respondent changed the conditions of employment of affected on-call employees.

C. The Change Gave Rise to an Obligation to Bargain

The Statute requires that, absent a clear and unmistakable waiver of bargaining rights, parties must satisfy their mutual obligation to bargain before implementing changes in conditions of employment of unit employees. See, for example, U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts, 38 FLRA 770, 784 (1990). With regard to changes in unit employees' conditions of employment initiated by an agency, a union must be provided with notice of the change and an opportunity to bargain over the change. See, for example, Lexington-Blue Grass Army Depot, 38 FLRA at 649.

Moreover, an agency must bargain concerning the impact and implementation of a change that has more than a de minimis impact on unit employees. See, generally, Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986) (SSA).

In SSA, the Authority stated that whether a change in conditions of employment requires impact and implementation bargaining requires analysis of the pertinent facts and circumstances presented in each case. In examining the record, the Authority places principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees.

Applying the SSA standard, we conclude that the effect of Ogden's placement of on-call employees in a nonpay status was more than de minimis and gave rise to an obligation to bargain over the impact and implementation of that decision. The change to a nonpay status results in the on-call employees' loss of compensation, unearned service credit, and benefit costs. See Respondent's Exhibit 2 at 3. The loss of compensation and benefits is a matter of fundamental importance to employees and has a significant effect on their conditions of employment. We find, therefore, that the Respondent's placement of on-call employees in a nonpay status constituted a change in those employees' conditions of employment that was more than de minimis.

D. Ogden Did Not Satisfy Its Obligation Under the Statute

The General Counsel asserts that the Respondents violated the Statute "by failing to provide the Union with specific advance notice of their intention" to make the changes and "by failing to bargain with the Union over the impact and implementation of" the changes. Exceptions at 7. With regard to notice, the General Counsel alleges that the Union was entitled to notice in writing and to more specific notice than was given. The General Counsel states that the "purpose of the specific notice requirement is to afford the [U]nion a meaningful opportunity to request bargaining prior to implementation[.]" Id. at 8.

It is well settled that prior to implementation of a change in the conditions of employment of unit employees, an agency must provide a union with reasonable notice of the change and an opportunity to bargain, as appropriate, over the substance and/or impact and implementation of the change. See, for example, Lexington-Blue Grass Army Depot, 38 FLRA at 661. The notice provided by an agency to a union must be sufficiently specific or definitive regarding the actual change contemplated so as to adequately provide the union with a reasonable opportunity to request bargaining. See, for example, Internal Revenue Service (District, Region and National Office Unit and Service Center Unit), 10 FLRA 326, 327 (1982) (Member Applewhaite dissenting as to other matters).

We find that Ogden failed to provide the Union with such specific notice. In this regard, when Ogden orally informed the Union on December 9, 1987, that on-call employees would be placed in a nonpay status, it did not specify either the number of employees to be placed in a nonpay status or the expected date of the actions. Further, when Ogden orally informed the Union on December 28 that on-call employees would be furloughed on January 7 and 8, 1988, it did not inform the Union of the scope of the furlough. Thus, we find that Ogden failed to give the Union sufficiently clear and precise notice of its intent to furlough a substantial number of employees in early January 1988.

Further, it is undisputed that Ogden made no attempt to fulfill its obligation to bargain prior to implementation of the changes on January 8, 1988. In this regard, the Judge found that Ogden "did not meet to negotiate prior to the on-call employees having been placed in a nonpay status." Judge's Decision at 5 (footnote omitted). We find, therefore, that Ogden violated the Statute by implementing the change without first having satisfied its obligation to bargain over the impact and implementation of that change.

See, for example, Long Beach Naval Shipyard, Long Beach, California, 17 FLRA 511, 527 (1985).

Accordingly, we conclude that, by failing to provide adequate notice and by failing to bargain with the Union concerning the impact and implementation of placing on-call employees in a nonpay status prior to implementing the changes, the Respondent violated sections 7116(a)(1) and (5) of the Statute. See Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Denver District, Denver, Colorado, 27 FLRA 664 (1987).

VI. Remedy

As a remedy, the General Counsel requested that the Respondent be ordered to "cease and desist from failing and refusing to provide the Union with adequate prior notice and an opportunity to bargain over the impact and implementation of the January 8, 1988 furlough[.]" Exceptions at 12. The General Counsel requested that the Respondent further be ordered "to furnish adequate prior notice of any future furloughs" and to bargain on request over such future furloughs. Id. The General Counsel did not request a status quo ante order or other remedy.

Consistent with the General Counsel's request, and in order to carry out the purposes and policies of the Statute, we will order Ogden to cease and desist from refusing to adequately notify the Union and provide it an opportunity to bargain concerning the placement of on-call employees in a nonpay status and, upon request, negotiate in good faith concerning the impact and implementation of the placement of on-call employees in a nonpay status. We will also order Ogden to notify the Union of any future placement of on-call employees in a nonpay status and afford it an opportunity to bargain concerning the impact and implementation of such change.

VII. Order

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations, and section 7118 of the Statute, the Ogden Air Logistics Center, Hill Air Force Base, shall:

1. Cease and desist from:

(a) Implementing the placement of on-call employees in a nonpay status without first notifying the American Federation of Government Employees, AFL-CIO, Local 1592, the exclusive representative of its employees, and affording it the opportunity to bargain concerning the procedures which management will observe in effecting such change and appropriate arrangements for employees affected by such change.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, negotiate in good faith with the American Federation of Government Employees, AFL-CIO, Local 1592, the exclusive representative of its employees, concerning the procedures to be observed in implementing the placement of on-call employees in a nonpay status and concerning the appropriate arrangements for employees adversely affected by such change.

(b) Notify the American Federation of Government Employees, AFL-CIO, Local 1592 of any future placement of on-call employees in a nonpay status, and prior to implementation, afford it an opportunity to bargain concerning the procedures which management will observe in effecting such change and appropriate arrangements for employees adversely affected by such change.

(c) Post at its facilities where unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Ogden Air Logistics Center and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.20 of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

The portions of the complaint alleging unfair labor practice violations by Air Force Logistics Command, Wright-Patterson Air Force Base are dismissed.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement the placement of on-call employees in a nonpay status without first notifying the American Federation of Government Employees, AFL-CIO, Local 1592, the exclusive representative of our employees, and affording it the opportunity to bargain concerning the procedures which management will observe in effecting such change and appropriate arrangements for employees affected by such change.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request, negotiate with the American Federation of Government Employees, AFL-CIO, Local 1592, the exclusive representative of our employees, concerning the procedures to be observed in implementing the placement of on-call employees in a nonpay status and concerning the appropriate arrangements for employees adversely affected by such changes.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 1592 of any future placement of on-call employees in a nonpay status, and prior to implementation, afford it an opportunity to bargain concerning the procedures which management will observe in effecting such change and appropriate arrangements for employees adversely affected by such change.

_____

(Agency)

Dated:_____

By:_____

(Signature) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Regional Office, whose address is 1244 Speer Boulevard, Suite 100, Denver, Colorado, 80204 and whose telephone number is (303) 844-5224.

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. 7101, et seq.,*1 and the Rules and Regulations issued thereunder, 5 C.F.R. 2423.1, et seq., concerns whether Respondents*2 violated sections 6(a)(5), and (1) of the Statute by placing on-call employees in a nonpay status prior to bargaining over the impact and implementation of such action. As they are employed specifically subject to periodic release to a nonpay status, Respondent changed no condition of employment when it placed on-call employees in a nonpay status and, for reasons more fully set forth hereinafter, Respondent did not violate section 16(a)(5) or (1) of the Statute.

This case was initiated by a charge filed on January 7, 1988 (G.C. Exh. 1(a)). The Complaint and

Notice of Hearing issued on May 26, 1988, and set the hearing for July 13, 1988 (G.C. Exh. 1(b)). By Order dated June 22, 1988 (G.C. Exh. 1(e)), the hearing was rescheduled, on motion of the Charging Party, for good cause shown, for September 13, 1988; and by Order dated September 7, 1988, the hearing was further rescheduled for September 15, 1988 (G.C. Exh. 1(f)), pursuant to which a hearing was duly held on September 15, 1988, in Ogden, Utah, before the undersigned. All parties were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which the Charging Party exercised and the other parties waived. At the conclusion of the hearing, October 17, 1988, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, for good cause shown, to November 10, 1988. Each party timely mailed a brief, received on November 14, 1988, which have been carefully considered. Upon the basis of the entire record,*3 I make the following findings and conclusions:

Findings

1. At all times material, the American Federation of Government Employees, AFL-CIO (hereinafter referred to as "AFGE") has been the certified exclusive representative of a nationwide bargaining unit of employees of the Air Force Logistics Command (hereinafter referred to as "AFLC"), as more fully described in the Master Labor Agreement (G.C. Exh. 2, Articles 1 and 2), including employees of Respondent's Hill Air Force Base.

2. American Federation of Government Employees, AFL-CIO, Council 214 (hereinafter referred to as "Council 214") is an affiliate of AFGE and Council 214 and AFLC are parties to the Master Labor Agreement (G.C. Exh. 2, Article 1).

3. American Federation of Government Employees, AFL-CIO, Local 1592 (hereinafter referred to as the "Union") is an affiliate and agent of AFGE and of Council 214 for the representation of Respondent's employees. The Union and Respondent are parties to a Local Supplement Agreement (G.C. Exh. 3).

4. In 1987, Respondent employed about 250 to 300 on-call employees, most of whom were employed in the Maintenance Directorate, and all of whom were in the bargaining unit. (Tr. 17, 29, 30). On-call employment is governed by Government-wide Regulation, FPM Chapter 340 (Res. Exh. 2); and is augmented by Respondent's Regulation, AWEIGH-ALC-HAFB Regulation 40-340 (Res. Exh. 3) and by the parties' Local Supplement Agreement (G.C. Exh. 3, Art. 16(S), p. 30).

5. On December 9, 1987, Mr. William S. Shoell, President of the Union (Tr. 28) and Mr. Harlan Francis, Master Chief Steward of the Union and chief steward of maintenance (Tr. 16), were called to a meeting with several management officials and informed that on-call employees in maintenance would probably be placed in a non-pay status*4 in January, 1988, because of the lack of work and funding but management was unable to provide details (Tr. 16, 17, 29).

6. Although recognizing that he might be premature, Mr. Shoell nevertheless, by letter dated December 18, 1987, served a notice to bargain and submitted nine proposals, the first, in part, being that, "1. There be no furlough . . . ." (G.C Exh. 4). By letter dated December 21, 1987, Mr. Shoell submitted two further proposals (G.C. Exh. 5).

7. On, or about, December 28, 1987, Respondent notified Mr. Francis that on-call employees would be furloughed on January 7 and 8, 1988 (Tr. 18, 32, 42).

8. Also on, or about, December 28, each on-call employee identified for placement in a non-pay status, determined by the Base Retention Roster as provided by the Local Supplement Agreement (G.C. Exh. 3, Art. 16(5); Tr. 52), was given a letter (Res. Exh. 1; Tr. 6-7, 52-53) which told each the exact date of release to non-pay status and the reasons for it. (Tr. 53). Affected employees were given a briefing regarding their rights and benefits while in a nonpay status. (Tr. 52-53).

9. On, or about, January 8, 1988, 131 on-call

employees were placed in a nonpay status (G.C. Exh. 6) and remained in a nonpay status for about six months (Tr. 37, 59).

10. Respondent did not meet to negotiate prior to the on-call employees having been placed in a nonpay status.*5

Conclusions

On-call employees work on an as needed basis during periods of heavy workload; their employment is governed by Government-wide Regulations (FPM Chapter 340, Res. Exh. 2), American Federation of Government Employees, AFL-CIO, Local 1858, 26 FLRA 102, 106-107 (1987), American Federation of Government Employees, AFL-CIO, National Council of SSA Field Operations Locals, 25 FLRA 622, 626-627 (1987); is argumented at Hill Air Force Base by local regulation (AWEIGH-ALC-HAFB Regulation 40-340, Res. Exh. 3) and by the parties' Local Supplement Agreement (G.C. Exh. 3, Art. 16(5)); on-call employees had previously been placed in non-pay status by Respondent; and Respondent made no change whatever in established conditions of employment when it gave notice (on, or about, December 28, 1987) and placed on-call employees in a nonpay status (on, or about, January 8, 1988).

A condition of employment of all on-call employees is employment on an as needed basis and placement in a nonpay status at the end of peak workload periods. The Federal Personal Manual provides, in part, as follows:

"3-5 TERMS AND CONDITIONS OF EMPLOYMENT

a. Since an on-call employee is subject to periodic release and recall to and from nonduty/nonpay status as a condition of employment, it is imperative that candidates understand and agree to these conditions prior to actually entering on duty.

b. A special employment agreement must be executed between the agency and the on-call employee at the time of appointment . . . ." (Res. 2).

When Respondent began the on-call employment some years prior to 1988, it initiated, as required, an "'ON-CALL' WORKING AGREEMENT" (Res. Exh. 4), which is sent with employment inquiries; at their interview the Agreement is reviewed; and the employee signs it (Tr. 56).

Respondent was obligated to bargain during the term of the collective bargaining agreement on negotiable union-initiated proposals. Internal Revenue Service, 29 FLRA 162 (1987). Although "on-call" employment was addressed in the Local Supplement Agreement, it is not asserted by Respondent that the Union waived its right to negotiate further on the matter. Presumably, as the Complaint implies, the parties did meet to negotiate on the Union's proposals. No opinion is expressed as whether any of the Union's proposals were, or were not, negotiable; but, even though Respondent placed the on-call employees in a nonpay status before it met to negotiate, Respondent changed no condition of employment by implementing its notice on, or about, January 8, 1988. Stated otherwise, Respondent's obligation to bargain on the Union's mid-term proposals did not affect Respondent's right to continue existing conditions of employment, including placing on-call employees in a nonpay status which, as noted, was specifically a condition of their employment. General Counsel misconstrues the applicability of Department of the Air Force, Scott Air Force Base, Illinois, 19 FLRA 136 (1985). Unlike the employees in Scott Air Force Base, supra, it is a condition of employment of on-call employees that they are subject to periodic release to nonpay status.

Having found that Respondent did not violate section 16(a)(5), or (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 7-CA-80212 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY Administrative Law Judge

Dated: September 20, 1989 Washington, D.C.

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1. For convenience of reference, sections of the

Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(5) will be referred to, simply, as " 16(a)(5)."

2. Notwithstanding that there is a nationwide bargaining unit of employees of the Air Force Logistics Command, there was no evidence or testimony that Respondent Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, played any part whatever in the events which gave rise to this proceeding; nor is there any contention that the actions involved herein were not the actions of the activity. cf. Department of the Air Force, Air Force Logistics Command, Egden Air Logistics Center, Hill Air Force Base, Utah, 17 FLRA 394 (1985). Accordingly, those portions of the Complaint alleging unfair labor practices by the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, are hereby dismissed and all references hereinafter to alleged unfair labor practices will be solely to Respondent Ogden Air Logistics Center, Hill Air Force Base, Utah.

3. General Counsel's Motion to Correct Transcript, to which no opposition was filed, is hereby granted and the transcript is hereby corrected as set forth in the Appendix.

4. Employees hired into on-call positions are not furloughed but are placed in a non-pay status. (FPM, Res. Exh. 2, Section 3-1). Nevertheless, Messrs. Shoell and Francis referred to it as "furloughed" and Ms. Anna L. Sessions, Personnel Staffing Specialist (Tr. 49), stated that for practical purposes placing an on-call employee in non-pay status was essentially the same as furlough. Accordingly, for the purpose of this case, the terms are used interchangeably, although it is recognized that on call employees are not furloughed and that, where their technical status is in issue, there may be differences between on-call employees on non-pay status and other employees on furlough.

5. This case does not involve any allegation that Respondent failed or refused to bargain but only that, "The placement of on-call employees in a non-pay status . . . was implemented . . . prior to bargaining over the impact and implementation of such action . . . ." (G.C. Exh. 1(b), Par. 9(b)). I assume, as the Complaint clearly implies, that bargaining did occur, although, as noted that is not at issue in this proceeding.

